



UTAH COUNTIES INDEMNITY POOL

PERSONNEL WORKSHOP

UTAH LAWS EVERY EMPLOYER SHOULD KNOW

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SUSAN BLACK DUNN has been a partner and shareholder at the Salt Lake City, Utah law firm of Dunn & Dunn, P.C. since 1998. She formerly was the Director of Equal Employment Opportunity and Diversity at American Stores Company. American Stores Company was a fortune 500 company with over 3,000 grocery and drug stores with approximately 127,000 employees throughout the United States. Before joining American Stores Company, Susan practiced law with the law firms of Black & Moore and Callister, Duncan & Nebeker. Susan has expertise in various aspects of employment law including, discrimination, harassment, and workers compensation. Susan and Dunn & Dunn, P.C. have represented the members of UCIP in numerous cases for over 15 years. She has had extensive jury trial and litigation experience. Susan also represents, consults and provides education to many employers in the state of Utah. Susan received her B.A. from the University of Utah in Political Science and her J.D. from the S.J. Quinney School of Law at the University of Utah where she was named a Leary Scholar for academic excellence. She also received the Lyndon Baines Johnson fellowship to serve in the United States House of Representatives.

## UTAH LAWS EVERY EMPLOYER SHOULD KNOW

### I. LEGISLATIVE UPDATE – 2018 & 2019

#### Emergency Services Volunteer Employment Protection Act (UCA 34-54-101)

Prohibits employers, including public employers, from terminating an employee for being an emergency service volunteer. Employers are prohibited from disciplining an employee for being late or missing work when he/she has been called to an emergency. Employers can request written verification the employee was late or missed work due to the emergency. Employees can be docked pay for the time they missed from work. Creates a civil cause of action for violations of the act.

#### Expungement Changes (UCA 34-52-301)

Prohibits public employers from inquiring into an applicant's expunged criminal history, except in certain circumstances. Permits an applicant to answer a question related to an expunged criminal record as though the criminal act never happened, except in certain circumstances. A public employer may not exclude an applicant from an initial interview because of a past criminal conviction. The public employer "excludes" an applicant from the initial interview if (a) it requires the an applicant to disclose a criminal conviction on an employment application; (b) it requires an applicant to disclose a criminal conviction before the initial interview; (c) if no interview is conducted, requires an applicant to disclose, before making a conditional offer of employment, a criminal conviction. However, a public employer may ask about criminal convictions during an initial interview and consider it when making a hiring decision. Exceptions to these prohibitions: (a) if mandated by law; (b) law enforcement jobs; (c) criminal or juvenile justice system jobs; (d) nonemployee volunteer position; (e) jobs with children or vulnerable adults; (f) jobs with Dept. of alcoholic beverage control; (g) State Tax Commission; (h) jobs dealing with financial or fiduciary functions.

#### Medical Cannabis Act Amendments (UCA 4-41(a))

As it applies to public employers. Clarifies exception to employment protection regarding public employee's lawful use of medical cannabis in the context of certain positions related to federal requirements. Requires public employers to provide written notice to employees and prospective employees whose job duties and assignments under state's medical cannabis programs may violate federal laws. States public employees who sign notice regarding duties and assignments that may violate federal law may not subsequently rely on state whistleblower protections to refuse to

carry out an assignment or duty that may violate federal law. Requires the Utah Department of Human Resource Management to create and publish a form notice for public employees regarding the employees' involvement in the state's medical cannabis programs.

#### Utah Protection of Public Employees Act and Amendments (UCA 67-21-1) Utah's Whistleblower Statute

Prohibits public employers from taking adverse action or retaliating against an employee when the employee or someone acting in his/her behalf communicates in good faith (a) the waste or misuse of public funds, property, or manpower; (b) a violation or suspected violation of law, rule, or regulation adopted under the laws of the state of Utah, a political subdivision of the state, or any recognized entity of the United States by a state public employer that amounts to (a) gross mismanagement; (b) abuse of authority; or (c) unethical conduct. Amendments in 2019 include certain exemptions from Utah's Governmental Immunity Act requirements. The amendments also call for the creation of an independent personnel board to hear complaints in higher education. There is a statute of limitation to bring complaints of 180 days. The time for filing can be extended if the employee originally brought the complaint timely, but it was dismissed without prejudice and not on the merits. The employee can refile within 180 days after the dismissal.

#### Utah Antidiscrimination Act and Amendments (UCA 34A-5-101)

UADA applies to most employers who have 15 or more employees, including public employers, in the state of Utah. Prohibits discrimination, including harassment, on the basis of (a) race; (b) color; (c) sex; (d) pregnancy, child-birth, pregnancy related conditions; (e) age (over 40); (f) religion; (g) national origin; (h) disability; (i) sexual orientation; (j) gender identity. Prohibits retaliation against an employee who brings a claim or third parties who provide information regarding a claim. Prohibits any person from aiding, inciting, compelling, or coercing any act prohibited by UADA. Applies to employment agencies and labor unions. Requires employers to provide reasonable accommodations for employees related to pregnancy, child-birth, breast feeding, or related conditions, if requested by the employee, unless it would cause unreasonable hardship on the operation of the business. Requires employers to post in a conspicuous place and in handbook, employees' rights under UADA, including rights to reasonable accommodations. Requires employers to make reasonable accommodations regarding dress and grooming policies, sex specific facilities (including restrooms, locker rooms, showers,, and dressing rooms) based on gender identity. UADA does not specifically address reasonable accommodations for religious practices. However, the act does protect an employee's right to express religious beliefs in the workplace in a reasonable, non-disruptive, and non-harassing way. However, the employer can limit religious expressions if they are in direct conflict with the essential business-related interests. It is not discrimination if the employer gives

preference to (a) spouse, child, daughter or son in law; (b) person for whom the employer is liable for financial support; (c) person who the employer has provided financial support for preceding six months; (d) person for whom the employer has paid for education for the past two years. The act allows certain actions relating to age; namely bona fide seniority system or employment benefit plan. Compulsory retirement at age 65 or older is allowed if it is pursuant to a bona fide executive or high policy making positions for at least two years immediately prior to retirement if the employee is entitled to a retirement benefit of at least \$44,000 per year. The act provides for certain remedies for noncompliance. The administrative procedure is the exclusive remedy under Utah law. The employee can file a charge of discrimination with the Utah Antidiscrimination Division. The 2018 amendment calls for voluntary mediation before the division begins its investigation. If early resolution is unsuccessful, the division must conduct an investigation and issue findings of fact and order. Either party can request a hearing before a Utah Labor Commission administrative law judge. The judge order may be appealed to the Commissioner or the Commission's Appeal Board. Either party can request judicial review of the Commission's order. A charging party (employee) can withdraw from the process at any time before a final order is issued and proceed with litigation. Remedies allowed by UADA include injunctive relief, reinstatement, back wages, benefits, attorneys' fees, and costs.

#### Governmental Immunity Revisions (63G-7-201)

Amendments to the UGIA in 2019 include (a) waives governmental immunity for injury resulting from certain claims of sexual battery; (b) provides additional basis for disallowing governmental entity to challenge the timeliness of the notice of claim; (c) modifies the time for filing an action against a governmental entity; (d) modifies provision relating to governmental entity's response to a notice of claim; (e) modifies provision relating to plaintiff's filing of an undertaking in an action under UGIA; (f) increases aggregate limit on injury claims against governmental entities; (g) provides for board of examiners to require special master proceeding for excess damages claims the board of examiners considers; (h) authorizes the use of money in the General Fund Budget Reserve Account to pay for claims approved by board of examiners. As UGIA relates to human resources professionals, the important part of the amendments deal with notice. The notice of claim can be hand delivered or mailed to the county clerk when the claim is against the county. Governmental entities shall file a statement with the Division of Corporations and Commercial Code at the Department of Commerce stating (a) name and address of the governmental entity; (b) the office or agent designated to receive notice of claim; (c) the address at which the notice of claim is to be directed and delivered. This statement should be updated as necessary.

## II. OTHER UTAH EMPLOYMENT LAWS

### Genetic Testing Restrictions on Employers Act (UCA 34A-11-102)

Prohibits employers from asking about or considering private genetic information about an employee or prospective employee in decisions regarding hiring, promoting, or retaining except when the employer has a reasonable basis to believe that the individual's health condition poses a real and unjustifiable safety risk requiring the change or denial of an assignment. Employer can seek a court or administrative agency order compelling the disclosure of private genetic information in the following circumstances, (a) an employment related judicial or administrative proceeding in which the employee has placed his/her health at issue; (b) an employment related decision in which the employer has a reasonable basis to believe that the individual's health condition "poses a real and unjustifiable safety risk requiring a change or denial of an assignment."

### Internet Employment Privacy Act (UCA 34-48-201)

Prohibits employers from asking or disciplining employees because they will not disclose usernames and passwords to their personal internet accounts. Creates a private right of action for violation of the statute and a fine of not more than \$500.

### Jury Service (UCA 78B-1-116)

Prohibits employers from firing employees because they receive and respond to a summons, serve as a juror, or attend court for prospective jury service.

### Military Leave (UCA 39-1-36)

Prohibits employers from refusing to reinstate members of the military or military reserves on return from required leaves of absence for service.

### Drug and Alcohol Testing (UCA 33A-38-1)

Protects employers who conduct drug and alcohol testing from liability if they follow the criteria set forth in the statute. Employers may test after conditional offer of employment if they do so for all prospective employees. Employers may test after on-the-job injuries and accidents if they do it with all employees who fall into this category. Employers may test with "just cause." Employers may test randomly if they include all employees. Management must submit to drug and alcohol testing on a periodic basis if they are going to test rank and file employees. Before a test can be considered a failed test and used for denying or terminating employment or disciplining employees, there must be a confirmatory test using gas chromatography, gas chromatography-mass



spectroscopy, or other reliable methods. If the test is done with urine, it must be analyzed by a laboratory certified by the United States Department of Health and Human Services under the National Laboratory Certification Program. The testing must be done pursuant to written policies that are given to employees and prospective employees. Test results are confidential, but can be used in taking action against the employee or to defend claims brought by the employee.

#### Employer Reference Immunity (UCA 34-42-1)

Provides for a qualified privilege for an employer who, in good faith, provides information about job performance, professional conduct, or evaluations of a former or current employee to a prospective employer at his/her request. Creates a rebuttable presumption that an employer is acting in good faith when providing the requested information. The presumption can only be rebutted with clear and convincing evidence that employer disclosed the information with actual malice and intent to mislead.

#### Employment Selection Procedure Act (UCA 34-46-101)

Prohibits employer of 15 or more employees from asking applicants for social security number, date of birth, or driver's license number before applicant is offered a job. Exception if the applicant consents to the request and the employer asks all applicants for the same information at the time the employer does one of the following, (a) obtains a criminal background check; (b) obtains a credit history and report; (c) obtains a driving record; (d) reviews internal records to determine if the applicant previously applied or worked for the employer; (e) collects information for a governmental entity for various programs and benefits. Prohibits employer from using the information for anything but deciding whether to hire the applicant. Requires the employer to keep information confidential and to have policies regarding retention, disposition, access, and destruction. Requires the information to be destroyed within two years. Grants the Utah Antidiscrimination and Labor Division the authority to investigate alleged violations. The Division can issue cease and desist orders and order a fine of \$500.

#### Interception of Communications Act (UCA 77-23a-1)

Prohibits employers or others from intentionally or knowingly intercepting or trying to intercept (either personally or getting someone to) by wire, electronic, or oral communications of employees or others. However, employers may intercept such communications if they have the employee's consent to the interceptions or if they are the other party to intercepted communications unless the communications are regarding criminal or tortious act. Violations of this act are a class A misdemeanor. The person claiming his/her rights were violated may sue for actual damages, including compensatory damages, punitive damages, and/or injunctive relief.

## Privacy Violations (UCA 76-9-402)

Prohibits persons, including employers, from installing or using devices for observing, photographing, hearing, recording, amplifying, or broadcasting sounds or events in any private places unless they have the consent of the persons who are entitled to privacy in those places. It doesn't matter if the devices are installed inside or outside of private places. Violations are a class B misdemeanor.